

STATEMENT OF THE CASE

Appellant-Defendant Keith W. Winchester appeals his sentences for involuntary manslaughter and battery causing serious bodily injury, Class C felonies. We reverse and remand with instructions.

ISSUE

Winchester raises a single sentencing issue for our review, which we expand and restate as:

- I. Whether the trial court's sentencing statement contains aggravators based on an improper interpretation of the law.
- II. Whether the sentence imposed by the trial court was inappropriate.¹

FACTS

On July 20, 2006, Winchester and the victim, Jeffery A. East, entered into an argument in a restaurant located in Frankfort, Indiana. East then went to the Frankfort Police Department and reported that Winchester had hit East in the head with his fist. Other restaurant patrons confirmed East's claim. Tragically, East died the next day. An autopsy confirmed that East's death was a result of the blow delivered by Winchester.

Winchester was tried by a jury and found guilty of the above-mentioned offenses. The trial court ordered that he serve seven years, with five years executed and two years on probation.

DISCUSSION AND DECISION

I. PROPRIETY OF SENTENCING STATEMENT

¹ Winchester also questioned whether the entry of convictions for involuntary manslaughter and battery resulting in serious bodily injury violated double jeopardy principles. The State agrees that such an entry is improper and that the battery conviction should be vacated.

Winchester contends that the trial court used improper aggravators in determining that the sentences should exceed the advisory sentence of four years. In *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on rehearing*, 875 N.E.2d 218 (2007), our supreme court held that trial courts are required to enter sentencing statements whenever imposing a sentence for felony offenses. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* If the recitation includes the finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.* Sentencing decisions are subject to review on appeal for an abuse of discretion. *Id.*

A trial court may abuse its discretion by (1) failing to enter a sentencing statement at all; (2) failing to enter a sentencing statement that explains reasons for imposing a sentence; (3) giving reasons that are not supported by the record; (4) omitting reasons that are clearly supported by the record; or (5) giving reasons that are improper as a matter of law. *Id.* at 490-91. Except as a part of our review under Appellate Rule 7(B), we do not review the weight assigned to mitigating or aggravating factors. *Id.* at 491.

In its written sentencing statement, the trial court stated the following as pertinent circumstances:

1. The defendant has a criminal history that consists of an old misdemeanor charge for which he received probation and the present offenses of Battery Resulting in Bodily Injury and Involuntary Manslaughter, both Class C felonies. The defendant has no prior felony convictions and was never committed to Boys School as a juvenile.

2. The defendant contributes to the community by showing goodwill toward those in need by having charity events.
3. The defendant has a history of physical violence toward others. On August 15, 1994, Jeffrey W. Cline filed a civil suit against the defendant for medical bills incurred as a result of being struck by the defendant. On October 15, 2001, Jay Wampler reported to the Frankfort Police Department that the defendant punched him in the face knocking out two teeth.
4. The mother of the victim, Marilyn Swearingen, requests that the defendant be sentenced to the fullest extent of the law.

Appellant's App. at 27.

Winchester maintains that the trial court's sentences are based upon three aggravators that are improper as a matter of law. Although the State argues that #1 above is an aggravator, it certainly is not clearly so. The trial court's characterization of the prior criminal involvement as "an old misdemeanor charge" appears to be the court's determination that the lack of a meaningful criminal history is a mitigating circumstance. This becomes apparent when read in conjunction with the immediately subsequent mention of Winchester's lack of juvenile history and his charitable acts. Indeed, the court remarked during the sentencing hearing that "there isn't a lot of criminal history."

Appellant's App. at 88.

Winchester contends that the court's reference to his prior history of violence is improper because Ind. Code § 35-37-1-7.1(a), which lists statutory aggravators, refers to a history of criminal or delinquent behavior and/or commission of a crime of violence. Winchester reasons that because the prior victims did not press charges, but instead pursued and recovered damages in civil actions, the trial court improperly used the prior

history as an aggravator. We note, however, that subsection (c) of the statute states that subsection (a) does not “limit the matters that the court may consider in determining the sentence.”

Here, Winchester acknowledged his prior violence toward two other victims. We cannot say that the trial court abused its discretion in considering this violence as an aggravating circumstance.

Winchester contends that the trial court’s reliance on Mrs. Swearingen’s wishes was improper as a matter of law. We must agree. As we held in *Bacher v. State*, 686 N.E.2d 791, 801 (Ind. 1997), “Under normal circumstances the impact upon family is not an aggravating circumstance for purposes of sentencing.” The impact is an aggravator only when there is an impact “of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant.” *Id.* While we understand that East’s family feels a terrible loss, we note that such an impact on family members accompanies almost every tragic death, and we have previously held that it is encompassed within the range of impact that the advisory sentence is designed to punish. *See id.* In the present case, nothing in the trial court’s sentencing statement suggests that the impact on the victim’s mother or other family members is of the type so distinct as to rise to the level of an aggravating circumstance.

While it is true that a single proper aggravator may support a sentence beyond the advisory sentence, we cannot say that the trial court would have arrived at the same conclusion if it realized that its sentence was supported by the cited lone aggravator. Indeed, our decision below renders this issue moot.

II. APPROPRIATENESS OF THE SENTENCE

Winchester contends that the sentence imposed was inappropriate. A sentence authorized by statute will not be revised unless the sentence is inappropriate in light of the nature of the offense and the character of the offender. Indiana Appellate Rule 7(B). We must refrain from merely substituting our opinion for that of the trial court. *Sallee v. State*, 777 N.E.2d 1204, 1216 (Ind. Ct. App. 2002), *trans. denied*. In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Roney v. State*, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), *trans. denied*. The “nature of the offense” portion of the appropriateness review concerns the advisory sentence for the class of crimes to which the offense belongs; therefore, the advisory sentence is the starting point in the appellate court’s sentence review. *Anglemyer v. State*, 868 N.E.2d at 491. The “character of the offender” portion of the sentence review involves consideration of the aggravating and mitigating circumstances and general considerations. *Williams v. State*, 840 N.E.2d 433, 439-40 (Ind. Ct. App. 2006).

With reference to the nature of the offense, we first note that this court has been provided with almost no details of the argument and fight that ended with East being struck by Winchester. From the record provided, it is clear that that the five-foot-five-inch, 155-pound Winchester twice struck East’s head with his fist, and because of an “(Indiscernible) Syndrome” East tragically died the next day. *See* Appellant’s App. at 56. Although the results of this argument are tragic, they are of the nature contemplated by the advisory sentence.

With regard to the nature of the offender, we note that Winchester had one misdemeanor conviction that even the trial court classified as “old,” and we do not find it significant to our decision here. Winchester did have two fights over a twelve- to fourteen-year period prior to the fight with East, and we conclude that the trial court wisely ordered that Winchester take classes while on probation to assist in rehabilitating Winchester and in ensuring that fisticuffs will not recur. We also note that Winchester was remorseful, and he tried to reach the family immediately after the fight and before East’s death, to communicate that remorse. Finally, we note that the tenor of the trial court’s remarks at sentencing hearing, coupled with the improper aggravator described above, indicate that the court was heavily influenced by the wishes of East’s family to “see justice served to the fullest extent of the law.” Appellant’s App. at 60. However, as we note above, under the circumstances of this case, the wishes of the victim’s family are not sufficient to warrant an enhanced sentence. We conclude from our consideration of the nature of the offense and the character of the offender that the sentence imposed is inappropriate.

The advisory sentence for a Class C felony is four years. *See* Ind. Code § 35-50-2-6. We reverse and remand with instructions that the trial court vacate its sentence and sentence Winchester to four years with two years executed and two years probation. We also instruct the trial court to vacate the battery conviction.

Reversed and remanded.

ROBB, J., and MAY, J., concur.